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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 1424

ANNIE C. GORNTO,
Petitioner,

v.

THE STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Georgia

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THE STATE OF GEORGIA,
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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Georgia

Petitioner, Annie C. Gornto, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered in the above entitled case on the 3rd day of December, 1970.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Georgia is reported in 227 Ga. 46, ... S.E. 2d .... A copy of the opinion is printed in Appendix A hereto. No written opinion was rendered by the Judge of the Superior Court of Glynn County, Georgia.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on December 3, 1970.

The jurisdiction of this Court is invoked pursuant to 28 USC, § 1257 (3).

QUESTIONS PRESENTED

(1) Whether or not the magazine "Whiplash Lovers" can be determined to be obscene and unprotected under the First Amendment of the United States Constitution.

(2) Whether an adult's right to possess any reading matter, whether or not obscene, necessarily implies the right to purchase such material, and hence the right of petitioner to sell obscene material pursuant to the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

(3) Whether or not the First and Fourteenth Amendments to the United States Constitution require that the magazine "Whiplash Lovers" be authoritatively determined to be obscene, and notice of such determination be given to petitioner **prior** to a sale upon which any conviction can be based.

(4) Whether or not Section 26-2101 of the Georgia Code is unconstitutional as applied in violation of the First and Fourteenth Amendments to the United States Constitution in that:

(a) It was applied in such a way as to allow the jury to convict without comparative evidence showing what has been held to be obscene and what has been held to be constitutionally protected, which evidence is necessary so that the jury can make an informed decision on the

question whether given printed material "goes substantially beyond the customary limits of candor";

(b) It was applied in such a way as to allow the jury to convict without evidence that the magazine in question appeals to the prurient interest of the average member of the community.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Ninth and Fourteenth Amendments to the United States Constitution and the pertinent provisions of Georgia Laws are printed in Appendix B hereto.

STATEMENT OF THE CASE

On September 13, 1968, the Grand Jury of Glynn County, Georgia, by special presentment, charged petitioner with possession and sale of an allegedly obscene magazine entitled "Whiplash Lovers". Petitioner, by motions to dismiss, for a directed verdict, for a new trial and in arrest of judgment, asserted that:

(a) Petitioner had a right to sell the magazine in question even if it were determined to be obscene (Tr. 133-136);

(b) The magazine "Whiplash Lovers" was not obscene and consequently the First Amendment prohibited any conviction for the sale of the same (R. 14, ¶6; R. 33, ¶6; R. 63-70; Tr. 201-204); and

(c) Conviction for sale of any magazine was unconstitutional unless a prior judicial determination of obscenity had been made, notice had been given to petitioner and your petitioner had an opportunity to remove the offend-

ing materials from her shelves without the sale of the same (R. 13, ¶ 175; R. 27, ¶ 6; R. 33, ¶ 6; R. 34, ¶ 12; R. 37, ¶ 22; R. 48, ¶ 27; R. 54, ¶ 11; R. 58, ¶ 31; R. 59, ¶ 37; R. 53-70; Tr. 9-36; Tr. 201-204).

The motions were denied.

At trial, petitioner, through her counsel, attempted to introduce comparative evidence as to what material had been upheld as protected and what material had been held to be obscene. The trial court refused to admit this evidence (R. 51, ¶ 39; R. 31, ¶ 20; R. 56, ¶ 23; R. 63-70; Tr. 152-153; Tr. 201-204). Further, the trial court allowed the jury to convict on evidence which reflected that the magazine "Whiplash Lovers" appealed to the prurient interest of the average member of the local and not national community.

Petitioner was convicted of violating **Ga. Code**, § 26-2101, was sentenced to imprisonment for a twelve month term, fined $1,006.50 with the period of incarceration suspended on condition that the fine be paid and petitioner never again deal in, distribute or sell obscene material (Tr. 243).

In September, 1970, petitioner appealed the conviction to the Supreme Court of the State of Georgia. That Court affirmed the conviction on December 3, 1970. Its opinion is reported at 227 Ga. 46, a copy of which is printed in Appendix A hereto.

WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

I. The Magazine "Whiplash Lovers" Cannot Be Held Obscene.

The question which this Court should first consider is whether the magazine "Whiplash Lovers" can be con-

stitutionally determined to be obscene. In **Jacobellis v. Ohio**, 378 U.S. 184 (1964), Justice Brennan, writing for the Court, stated that each Court, including this Court, must independently review the "offending" material and determine whether it is constitutionally protected. See also **United States v. Klaw**, 350 F. 2d 155, 160 (2d Cir. 1965).

In reviewing the magazine "Whiplash Lovers", petitioner invites this Court's attention to its decisions in **Central Magazine Sales, Ltd. v. U. S.**, 389 U.S. 50 (1967), **Bloss v. Dykema**, 398 U.S. 278 (1969) and **A Book v. Attorney General**, 338 U.S. 413 (1966). In each case, explicit sexual references and pictures are described or shown in similar or greater candor. For example, in **Central Magazine Sales, Ltd.**, *supra*, the Court of Appeals for the 4th Circuit described the offending material, a magazine entitled "Exclusive" thus:

> "Exclusive is a collection of photographs of young women and most of them, long stockings and garter belts are employed to frame the pubic area and focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the models wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures, all of these things are combined: The model, clad only in a framing black garter belt and black stockings is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide."

This magazine was held to be within the First Amendment. The photographs in "Whiplash Lovers" are not any more explicit than those in "Exclusive".

The passages in "Whiplash Lovers" are similarly within the tolerance levels of the First Amendment. Com-

parison to "Fanny Hill" reflects that the passages are not significantly more explicit.[1]

Other explicit passages from protected literature similarly reflect that passages in "Whiplash Lovers" do not preclude the magazine from the protection of the First Amendment.[2]

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[1] In **A Book v. Attorney General,** 383 U.S. 413 (1966), Mr. Justice Clark described the book thusly:

> "Memoirs is nothing more than a series of minutely and vividly described episodes . . . In each of the sexual scenes the exposed bodies of the participants are described in minute individual detail. The pubic hair is often used for a background to the most vivid and precise descriptions of the response, condition, size, shape and color of the sexual organs before, during and after orgasm. There are some short intransitory passages between the various sexual episodes but for the most part they only set the scene and identify the participants for the next orgy, or make smutty references to and comparison to past episodes." 383 U.S. 413, at 446.

[2] The following passages are similar to those in "Whiplash Lovers":

> "Oh, don't tease him," said Connie, crawling on her knees on the bed towards him and putting her arms around his white slender loins, and drawing him to her so that her hanging, swinging breasts touched the tip of the stirring erect phallus, and caught the drop of moisture. She held the man fast.
>
> 'Lie down! he said. 'Lie down! Let me come!'
>
> D. H. Lawrence, "Lady Chatterley's Lover" (Grove Press) page 270.
>
> * * * *
>
> "O Lord I must stretch myself I wished he was here or somebody to let myself go with and come again like that I feel all fire inside me or if I could dream it when he made me spend the 2nd time tickling me behind with his finger I was coming for about 5 minutes with my legs around him I had to hug him after O Lord I want to shout out all sorts of things fuck or shit or anything at all only not to look ugly or those lines from the strain who knows the way he'd take it you want to feel your way with a man they're not all like him thank God some of them want you to be so nice about it I noticed the contrast he does it and doesn't talk I gave my eyes that look with my hair a bit loose from the tumbling and my tongue

With regard to the standards to be applied, we should like to invite the Court's attention to **Redup v. New**

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between my lips up to him the savage brute Thursday Friday one Saturday two Sunday three O Lord I can't wait till Monday"

James Joyce, Ulysses, Page 739.

* * * *

"wriggle into the cabinet and there I stand her up, slap up against the wall, and I try to get it into her but it won't work and so we sit down on the seat and try it that way but it won't work either. No matter how we try it it won't work. And all the while she's got hold of my prick, she's clutching it like a lifesaver, but it's no use, we're too hot, too eager. The music is still playing and so we waltz out of the cabinet into the vestibule again and as we're dancing there in the shithouse I come all over her beautiful gown and she's sore as hell about it."

Henry Miller, Tropic of Cancer, page 19.

* * * *

"I torture myself to think of some new pleasure for you, and yet you'll leave me, I feel you will, for some silly girl who can't feel a tithe of what I feel or give you what I give—' She began here to breathe quickly. 'I've been thinking how to give you more pleasure; let me try. Your seed darling, is dear to me: I don't want it in my sex; I want to feel you thrill and so I want your sex in my mouth, I want to drink your essence and I will—' and suiting the action to the word, she slipped down in the bed and took my sex in her mouth and began rubbing it up and down till my seed spirted in long jets, filling her mouth while she swallowed it greedily."

Frank Harris, My Life & Loves, page 140.

* * * *

"'John Thomas! John Thomas!' and she quickly kissed the soft penis, that was beginning to stir again."

D. H. Lawrence, Lady Chatterleys Lover at 271.

* * * *

"I am fucking you, Tania, so that you'll stay fucked. And if you are afraid of being fucked publicly, I will fuck you privately. I will tear off a few hairs from your cunt and paste them on Boris' chin. I will bite into your clitoris and spit out two franc pieces. . . ."

Henry Miller, Tropic of Cancer at 9.

* * * *

"He pulled Eric up and kissed him on the mouth, kneading Eric's buttocks and stroking his sex. How strange it

York, 386 U.S. 767, 18 L.ed. 2d 515, 87 S.Ct. 1414 (1967), in which the views of various members of the Court are

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felt, this violent muscle, stretching and throbbing, so like his own, but belonging to another!"

The scene continues:

"Their moment was coming to an end. He moaned and his thighs, like thighs of a woman, loosened, he thrust upward as Eric thrust down."

Baldwin, Another Country at 323, 325.

* * * *

"While here is a honey of a girl, with the softest, purist, most touching nipples I have ever drawn between my lips, only she won't go down on me. Isn't that odd? And yet—to understand people—it is her pleasure while being boffed to have one or the other of my forefingers lodged snugly up her anus."

Roth, Portney's Complaint at 116-117.

* * * *

"She pushes Drake's Daredevil Cupcakes (chololate with a white creamy center) down over my cock and then eats them off of me, flake by flake. She pours maple syrup out of the Log Cabin can and then licks it from my tender balls until they're clean again as a little baby boy's. Her favorite line of English prose is a masterpiece: "Fuck my pussy, Fuckface, till I faint." When I fart in the bathtub, she kneels naked on the tile floor, leans all the way over, and kisses the bubbles. She sits on my cock while I take a shit, plunging into my mouth a nipple the size of a tollhouse cookie, and all the while whispering every filthy word she knows viciously in my ear. She puts ice cubes in her mouth until her tongue and lips are freezing, then sucks me off—then switches to hot tea!"

Roth, Portney's Complaint at 147.

* * * *

"The Monkey came out of the bathroom in her short chemise (ordinarily a sight that made me very hot, that cream-colored silk chemise with a beautiful Monkey in it), and I meanwhile took off all my clothes and sat naked at the foot of the bed. That Lina spoke not a word of English only intensified the feeling that began to ebb and flow between The Monkey and myself, a kind of restrained sadism: we could speak to one another, exchange secrets and plans without the whore's understanding—as she and The Monkey could whisper in Italian without my knowledge of what they might be saying; or plotting . . . Lina

set out. These are Mr. Justice Black and Mr. Justice Douglas, no censorship at all for obscenity; Mr. Justice Stewart, "hard core pornography" only; "others"[3] to a

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spoke first and The Monkey turned to translate. "She says you have a big one." "I'll bet she says that to all the boys". Then they stood there in their underwear looking my way —waiting. But so was I waiting too. And was my heart pounding. It had to come to pass, two women and me . . . so now what happens? Still, you see, I'm saying to myself No!

"She wants to know," said The Monkey, after Lina had spoken a second time, 'where the signore would like her to begin." "The signore," said I, "wishes her to begin at the beginning . . ." Oh, very witty that reply, very nonchalant indeed, only we continue to sit there motionless, me and my hard-on, all undressed and no place to go. Finally it is The Monkey who sets our lust in motion. She moves across to Lina, above whom she towers (oh God, isn't she enough? isn't she really sufficient for my needs? how many cocks have I got?), and puts her hand between the whore's legs. We had imagined it beforehand in all its possibilities, dreamed it all out loud for many many months now, and yet I am dumbstruck, at the sight of The Monkey's middle finger disappearing up into Lina's cunt.

I can best describe the state I subsequently entered as one of unrelieved busy-ness. Boy, was I busy! I mean there was just so much to do. You go here and I'll go there—okay, now you go here and I'll go there—all right, now she goes down that way, while I head up this way, and you sort of half turn around on this . . . and so it went, Doctor, until I came my third and final time. The Monkey was by then the one with her back on the bed, and I the one with my ass to the chandelier (and the cameras, I fleetingly thought)—and in the middle, feeding her tits into my Monkey's mouth, was our whore. Into whose hole, into what sort of hole, I deposited my final load is entirely a matter for conjecture. It could be that in the end I wound up fucking some dank, odoriferous combination of sopping Italian pubic hair, greasy American buttock, and absolutely rank bedsheet."

Roth, Portney's Complaint at 155-157.

[3] The reference to "others" in **Redrup**, 386 U.S. 767 at 770, apparently was a reference to Mr. Justices Brennan and Fortas, and Mr. Chief Justice Warren, in view of the citation to the Fanny Hill case, and perhaps also to Mr. Justice White, since

"not dissimilar standard". Mr. Justice Marshall wrote the opinion in **Stanley**, and, as we have seen, the implications of that opinion go almost all the way with Mr. Justices Black and Douglas.

Applying these standards, we submit that "Whiplash Lovers", dismal and tawdry though it is, is no worse than the magazine "Exclusive" or the other material referred to herein and it is therefore equally entitled to the protection of the First Amendment.

II. Petitioner Has a Constitutional Right to Sell "Obscene" Literature to Adult Patrons

The conviction upon which this petition is based was for the sale of allegedly "obscene" material. Assuming arguendo that "Whiplash Lovers" is obscene (see discussion in part I supra), **Stanley v. Georgia**, 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1293 (1969) and its progeny prohibit a conviction under the facts alleged herein. While **Stanley**, in terms, only upheld the right of an adult to possess any literature of his choice, whether or not "obscene", by necessary implication it carried with it the right to purchase and sell obscene materials. First, this implication is necessary because any other conclusion would make the liberty referred to in the decision a meaningless one.

The Court's reliance upon **Griswold v. Connecticut**, 381 U.S. 479 (1965) and **Winters v. N. Y.**, 333 U.S. 507 (1948), clearly reflect the intent of the **Stanley** Court to include within the liberty expressly described the right to purchase and sell obscene literature. In **Griswold**, the Court

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he did not join the **Redrup** dissenters. Also, it apparently includes the rest of the Court, including the **Redrup** dissenters, in cases where the censor is the federal government. See **Central Magazine Sales, Ltd. v. U.S.**, *supra*, in which there were no dissenters.

held that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read. . . ." **Griswold v. Connecticut**, 381 U.S. 479, 482. In **Stanley**, the Court, after relying on **Griswold**, stated:

> "It is well established that the Constitution protects the right to receive information and ideas."

By relying upon **Griswold**, the Court must have implied that the possessor's source of obscene material, whether private or commercial, could not be punished by reason of his distribution of the same. The Court's reliance upon **Winters**, a case dealing expressly with a commercial distributor, further supports the implication. Nor can this implication be distinguished by treating **Stanley** as a Fourth Amendment case. It is a First Amendment case. While several commentators have interpreted **Stanley** simply as a privacy decision, such a construction is belied by the Court's description of the privacy factor as "an added consideration" and its formulation of the opinion in clear First Amendment terms. The principal underpinning of the opinion is really the right to receive obscene materials. It is this factor which gives the **Stanley** decision significance. **The Supreme Court, 1968 term**, 83 Harv. L. Rev. 7, 147, 151 (1969). The First Amendment aspect of Stanley is further emphasized by this Court's decision in **Rowan v. United States Post Office**, 397 U.S. 728, 25 L. ed. 2d 736, ... S. Ct. ... (1970). In **Rowan**, Title III of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 645, was the subject of review. The Court upheld the right of every person to be left alone within his own home and, in turn, to exclude unwanted materials which would be otherwise sent to him through the mails. It is highly significant to note that the **Rowan** decision does not cite **Stanley**. While there is

no question but that **Rowan** is related to the doctrine enunciated in **Stanley**, the Court's failure to cite **Stanley** further emphasizes **Stanley's** First Amendment aspects. **Supreme Court, 1969 term**, 84 Harv. L. Rev. 117, 119 (1970).

The wisdom of the **Stanley** decision is further emphasized by the Report of the Commission of Obscenity and Pornography. The Report states:

> "In view of the dissatisfaction with actual sources of sex education, the Panel felt that it would be fruitful to investigate the possibility of a relationship between sex education and exposure to pornography."
> "In fact, the findings indicate that exposure to explicit sexual material seems to occur in the context of conversation with friends in general quest for sex information."
> "In the normal course of an adolescent's development, it would seem that exposure to pornography and learning new things about sex from explicit sexual materials and from ones' friends is a common experience. The national survey inquired about people's exposure to ten kinds of explicit sexual depictions and descriptions. These range from nudity with sex organs showing through sexual intercourse, oral-genital activity, homosexual activity to sado-masochistic activity either in pictoral or textual form . . ."
> "The data indicate that (1) most people learn about sex from their peers, and (2) exposure to pornography occurs within the context of the peer group."
> "The national survey investigated the possibility of a relationship between the extent of use of explicit sexual materials in the actual source of sex information. In the case of both sexes, there was, in fact, a relatively high proportion whose sources of sex information had been friends or books or both, and

who also had been comparatively heavy users of sexual materials . . ."

"Fifty-two percent of adult men surveyed in the national survey felt that explicit sexual materials could provide information about sex. And forty-three percent of adult men reported that explicit sexual materials had provided information about sex either for themselves or for someone they had known personally."

"Also, sixty percent of the women surveyed felt that explicit erotic materials could provide information about sex, and thirty-five percent of them said this was true for themselves or for someone they had known personally . . ."

The Report of the Commission of Obscenity and Pornography, 314-316 (New York Times Edition, 1970).

Admittedly, obscene material may not be a preferred source of sexual information. However, it is also clear that several of the preferred sources of sexual information are decidedly inadequate and that sexually explicit materials can, in fact, be the source of highly revealing and valuable sexual material otherwise unavailable to the adult (See **Report**, *supra*).

To prohibit the adult from purchasing obscene material would be to engage in precisely the form of thought regulation which the Supreme Court in **Stanley** criticized when citing:

"Communities believe, and act on the belief, that obscenity is immoral, wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of

> the community and for the salvation and welfare of the 'consumer'. Obscenity, at bottom, is not a crime. Obscenity is sin. **Henkin, Morals and the Constitution: The Sin of Obscenity**, 63 Col. L. Rev. 391, 395 (1963)."

Subsequent to Stanley, numerous lower courts have considered whether its broad expressions of liberty extend to protection of a commercial distributor or seller of material which is assumed to be "obscene". Perhaps the leading case in the area is **Karalexis v. Byrne**, 306 F. Supp. 1363 (D. Mass. 1969), which is at present before this Court for review. In **Karalexis v. Byrne**, a three-judge court considered the question of whether or not consenting adults have the right under the First Amendment to view an obscene film in a public theater. The theater was showing the well known film, "I am Curious (Yellow)". The film was advertised in such a fashion that potential patrons were well aware of the nature of the film. Consequently, the lower Court found that no patron would be taken unaware and have his sensibilities offended. In its decision, the **Karalexis** Court relied heavily upon **Stanley**. The Court found that **Stanley** was a First Amendment case. The Court stated:

> "Of necessity the Stanley Court held that obscenity presented no clear and present danger to the adult viewer or to the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful." 306 F. Supp. at 1366.

The Court further stated:

> "Nonetheless, we think it probable that Roth remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think if Stanley has a constitutional right to

> view obscene films, the Court would **intend** its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier." Id.

Further, unless **Stanley** carried with it the corollary right to purchase from the professional supplier, the constitutional right to possess may essentially become meaningless. This results from the fact that the supplier would have a greater risk to exposure to criminal conviction in that any apprehended possessors would not under **Stanley** have a Fifth Amendment privilege to exert. **Karalexis v. Byrne** at 306 F. Supp., p. 1366, N. 8. The **Karalexis** Court clearly recognized the breadth of **Stanley** by stating that the right to possess would be an empty right if there were no corollary right to receive. If a rich **Stanley** can view a film or read a book in his home, the poor **Stanley** should be free to visit a protected theater or library.

On a similar conceptual predicate, the Central District of California invalidated 19 USC, § 1305 which prohibited importation of obscene material regardless of purpose. **U. S. v. Thirty-Seven (37) Photographs**, 309 F. Supp. 36 (C.D. Cal. 1970). In **Photographs, Luros**, a publisher of adult literature, entered the United States while in possession of the offending photographs. During a routine customs search, the photographs were discovered in Luros's luggage and seized under 19 USC, § 1305 as obscene. Luros contended, as he does before this Court, that **Stanley** allowed him to import the photographs, even if they were to be included in a book which would be commercially distributed. Only if the material was thrust on unwary or unwilling members of the public or fell into the hands of children could there be a conviction with respect to obscene material. The Court upheld the right to import the photographs. After relying on **Lamont v. Postmaster General**, 381 U.S. 301 (1965), a case holding that the right to

receive publications was a fundamental one, the Court stated:

> "The First Amendment could not be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent." 309 F. Supp. at 38.

In short, the Court recognized that absent the right to purchase obscene material, the market place would be barren having only buyers and no sellers. The Eastern District of California in **U. S. v. Lethe,** 312 F. Supp. 421 (1970) has recognized the full reach of **Stanley** also by upholding the right to commercially distribute obscene material. The Court stated that it would be impermissible to regulate the commercial distribution of obscene material except with respect to children or to an unwary public. Judge McBride's statements are particularly instructive.

> "I am aware of the grounds for support in this country for laws cracking down on smut peddlers. Numerous laws in this area are being considered by Congress. My decision today will certainly not comfort those who are concerned about this problem but this decision is narrowly circumscribed. It will interfere only with those laws which seek to tell an adult what literature he may acquire for his own enjoyment. We may not always agree with the literary taste of our fellow citizens but we may not impose our tastes upon others by censorship or other means unless there is some greater interest in the society at stake. That is the price we pay for a free society." 312 F. Supp. 426.

While several courts have been willing to follow the lead of the **Karalexis** Court, see **U.S. v. Articles of Obscene Merchandise,** 315 F. Supp. 191 (S.D.N.Y. 1970), and

also **U.S. v. Dellapia**, 433 F.2d 1252 (2d Cir. 1970), at least one other federal court, **U. S. v. Gower**, 316 F. Supp. 1390 (D.C.D.C. 1970) has refused to interpret **Stanley** to include the right to sell obscene material. However, without such an interpretation the rights established by this court in **Stanley** would be empty. For a further discussion of these matters, see Comment, **Karalexis v. Byrne and the Regulation of Obscenity, I am Curious (Stanley)**, 56 Va. L. Rev. 1205 (1970).

III

A Prior Adversary Hearing and a Determination of Obscenity Is Necessary to Convict Petitioner

The indictment should have been dismissed because the arrest of the defendant occurred without a prior adversary determination that the publication involved is obscene. Therefore, there was an unlawful prior restraint upon free speech.

It is probably unnecessary to cite extensive authority on the proposition that a seizure of publications prior to an **adversary** determination of their obscenity makes the publications seized inadmissible in evidence. A state prosecution based upon such illegally seized materials must necessarily fail. Such is the teaching of a long line of cases which are the progeny of **Marcus v. Property Search Warrant**, 367 U.S. 717 (1961) and **A Quantity of Books v. Kansas**, 378 U.S. 205 (1964).

The question for this Court to decide is whether or not only a seizure or purchase for use in prosecution of a movie film or book is prohibited (without a prior adversary hearing) by that line of authority but also the more drastic action of arrest and indictment. A three-judge district court sitting in the Fifth Circuit held that arrest and prosecution for selling alleged obscenity are

precluded, unless there shall have been a prior adversary hearing and a subsequent opportunity to discontinue selling the offending publication. That case is **Delta Books, Inc. v. Cronvich**, 304 F. Supp. 662 (1969).[4]

It seems to us that the conclusions of **Delta Books** is an irresistible one. The requirement of a prior adversary hearing is a First Amendment, not just a Fourth Amendment requirement. Probable cause and the issuance of a warrant based upon it are enough to satisfy the Fourth Amendment, except where materials presumptively protected by the first Amendment are involved.

The Supreme Court has often pointed out the necessity for sensitive tools where regulation of free speech and press is concerned, and that any system of prior restraint carried a heavy burden of justification. Obviously, the imposition of a prison sentence is more drastic than mere seizue of property, and accordingly, fear of prison will be more likely than fear of loss of property to cause a deadening imposition of self censorship by a distributor of books and magazines.

That a threat of criminal prosecution can have this effect and can constitute a prohibited censorship is attested to by **Bantam Books, Inc. v. Sullivan**, supra. The crux of the problem seems to lie in this: It is not con-

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[4] Petitioner is aware of the split of authority on this issue. See **Sokolic v. Ryan**, 304 F. Supp. 213 (S.D.Ga. 1969); **Milkey Way Productions v. Leary**, 305 F. Supp. 228 (S.D.N.Y. 1969), **aff'd** ... U.S. ... (1970); **Carter v. Gautier**, 305 F. Supp. 1098 (M.D. Ga. 1970), **aff'd** ... U.S. ... (1970). First, Petitioner submits that the rationale of **Delta Books** is compelling in light of the sensitivity of First Amendment freedoms. Second, the appearances do not rescue the issue. With respect to **Gautier**, the question was not clearly raised. With respect to **Milky Way**, the affirmance apparently rests on the passage of several months from the time of the complained of action to the time of the filing of the complaint. **City News Center, Inc. v. Carson**, 310 F. Supp. 1018 (M. D. Fla. 1970).

stitutionally permissible to punish one for selling obscenity without proof of scienter, and this is more than the knowledge of the law which every criminal defendant is presumed to have. **Smith v. California**, 361 U.S. 47, 4 L.ed. 2d 205, 80 S.Ct. 215, reh. den. 361 U.S. 950, 4 L.ed. 383, 80 S.Ct. (1959). In spite of that fact, juries are notoriously willing to convict for the "crime" of obscenity, although nobody can say with the smallest degree of confidence what it is, or whether any given publication will be regarded as obscene by a court. This is easily seen by a survey of the Supreme Court decisions, and those of lower courts, and law review articles since **Roth v. U.S.**, supra. A particularly telling commentary on this point is the *per curiam* opinion in **Redrup v. New York**, 386 U.S. 767, 18 L.ed. 2d 515, 87 S.Ct. 1414, reh. den. 388 U.S. 924, 18 L.ed. 2d 1377, 87 S.Ct. 2091 (1967), in which the Court apparently despaired over formulating a consistent rationale and simply counted noses.

The anomaly, then, is that (a) only obscenity may be suppressed, (b) sensitive tools must be used to make sure that non-obscenity is not suppressed, (c) no one can tell in advance what is and what is not obscene, (d) one should not be convicted without proof of scienter, (e) an implied threat to prosecute is impermissible censorship because it is not a sufficiently sensitive tool, (f) a "chilling" effect—**Dombrowski v. Pfister**, 380 U.S. 479, 14 L.Ed. 2d 22, 85 S.Ct. 1116 (1965)—is to be avoided, and yet (g) juries are willing to convict on almost any obscenity case that comes down the pike, probably because they are unable, naturally enough, to devine those "national" standards subsilentio under "contemporary community standards." **Jacobellis v. Ohio**, 378 U.S. 184, 12 L.Ed. 2d 793, 84 S.Ct. 1676 (1964). The bookseller cannot devine those standards either, and he may be forced to steer a course far away from any danger zone so as to avoid the risk of prosecution. The First Amendment commands more.

IV

A Jury May Not Convict for Obscenity Without Evidence Adequate to Show Contemporary Community Standards and What Appeals to the Prurient Interest of the Average Person

A jury must be carefully guided in the area of the First Amendment. It is clear that jurors should not consider their own personal reactions as setting the standard for obscenity. If it were otherwise, the statutory and constitutional standards would be merely empty words. What would happen would be just what happened in the Court below. The jury would hear the words of the statute to the effect that the magazine is protected unless it goes substantially beyond customary limits of candor, and unless its predominent appeal is to prurient interest. Having no notion what all this means and no evidence on which to base a decision, the juror would simply substitute his own notion of what is proper or decent, with the result that the constitutional limitations would go by the boards. Judge Moore in **U. S. v. Klaw**, 350 F.2d 155, 170 (2nd Cir. 1965) stated:

> "If the witnesses presented in this case provide any sampling, these pamphlets and pictures stimulated no one's prurient interest. Although it may be difficult to find expert and other witnesses properly qualified to inform the jury about what does or does not appeal to the prurient interest of the average person, cf. **Klaw v. Schaffer**, supra, 151 F. Supp. at 539-540, it would not seem impossible. On the other hand, it is clear that jurors should not consider their own personal reactions as setting the standard; there is too much truth in the observation that "what is pornography for one man is the laughter of genius to another." . . . "In this case, however, the only predi-

cate for any conclusion about prurient appeal was the material itself, as if res ipsa loquitor. The jurors were, therefore, left to speculate. They were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is 'prurient appeal.' Because the jury was given no basis of understanding exactly how and why the material appeals to its audience, whether deviate or average person, it may too readily supply an explanation—'prurient appeal.' . . . "Whatever the value of mere 'autopical' evidence in other contexts, it should not readily be countenanced in this area. Otherwise, too easily the Government's test might allow a jury to equate patent offensiveness to prurient appeal, thus obliterating the conjunction that has been thought indispensable. See e. g., **Manual Enterprises, Inc. v. Day**, supra, 370 U.S. at 482, 82 S. Ct. 1432; **Jacobellis v. State of Ohio**, supra, 378 U.S. at 191-192, 84 S. Ct. 1676. Too easily the jury could aid suppression simply on the basis of speculations and suspicions about the prurient appeal of material to some unknown, undefined person whose psyche is not known. With the First Amendment in the background, this cannot be abided."

Without such evidence, the result would be as Judge Moore in Klaw at 170 predicted:

"Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity. Having in mind the alternatives of jail or freedom, the Courts must be aware of the facts of the 'held not to be obscene' or 'approved' cases, and ensure the proof is sufficient to

> allow a fact finder to set this case apart from them. Otherwise, it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to read this stuff?' A conviction in every instance would be virtually assured."

U.S. v. Klaw is particularly significant in that this Court approved of its treatment of the evidentiary question herein in **Mishkin v. N.Y.**, 383 U.S. 502 (1966).

As a result of the failure to introduce the evidence referred to herein, the jury determined the issue of obscenity on a sense of literary value in defiance of the First Amendment.

V

The Standard Is a National Standard

It is clear that the conviction in the instant case was predicated upon proof that the material was obscene because it was offensive to the local community of Glynn County. This Court in **Jacobellis v. Ohio**, *supra*, stated:

> "It has been suggested that the contemporary community standards aspect of the Roth test implies a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises. This is an incorrect reading of Roth. While the standard of obscenity may vary from time to time, it cannot vary from county to county or state to state. Such a standard would deny access to certain communities protected items from other areas. The Court cannot permit constitutional limitations to vary between state lines."

This is precisely the effect of the lower court's ruling which the Supreme Court of Georgia exclusively approved and is in clear violation of **Jacobellis**. Consequently the conviction was clearly improper.

CONCLUSION

For each of these reasons, the Court is respectfully urged grant action, reverse the Court below and discharge the petitioner.

Respectfully submitted

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Certificate of Service

I, Hugh W. Gibert, counsel for appellant, hereby certify that I have this date served a copy of this Brief upon opposing counsel by mailing a copy of the same to Hon. William R. Killian, Special Prosecutor, properly addressed and with sufficient postage.

This 1st day of March, 1971.

Hugh W. Gibert

APPENDIX

APPENDIX A

26166. GORNTO v. THE STATE

The judgment sentencing appellant for the offense of distributing obscene materials is not erroneous for any reason urged.

ARGUED NOVEMBER 9, 1970—DECIDED DECEMBER 3, 1970

Distributing obscene materials; constitutional question. Glynn State Court. Before Judge Little.

This is an appeal from a conviction, in the State Court of Glynn County, of the offense of distributing obscene materials, *Code Ann.* § 26-2101 (Ga. L. 1968, pp. 1249, 1302), which provides in part as follows: "(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. (b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value, and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obsecene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it. (c) Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal."

Haas, Holland, Freeman, Levison & Gibert, Jack S. Hutto, for appellant.

Terrence Nichols, Solicitor, William R. Killian, for appellee.

FELTON, Justice. 1. *Code Ann.* § 26-2101 is not violative of the First and Fourteenth Amendments of the United States Constitution on the ground of vagueness. Gable v. Jenkins, 309 FSupp 998 (4) (N.D. Ga., 1969), affirmed, Gable v. Jenkins, 397 U. S. 592 (90 SC 1351, 25 LE2d 595). Enumerated error 1 is without merit.

2. *Code Ann.* § 26-2101, supra, is not violative of the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution on the ground that the constitutional right to mere possession of obscene material, recognized in Stanley v. Georgia, 394 U. S. 557 (89 SC 1243, 22 LE2d 542), necessarily implies the right to purchase such material and, hence, the right of others, including appellant, to distribute it. In the Stanley case supra, pp. 567-568, the Supreme Court specifically negated any relationship of interdependence between the States' recognized broad power to regulate the public distribution of obscenity, and the mere possession of such material by the individual in the privacy of his home, to which the States' power does not extend. See also, Gable v. Jenkins, 309 FSupp. 998, 1000, supra. Enumerated error 2 is without merit.

3. "There is no necessity for an adversary hearing on the question of obscenity of publications prior to the institution of a criminal action against the distributor, where the publications have been obtained by the prosecuting officers by purchase and no seizure of the publications is required for evidence." *Peachtree News Co. v. Slaton,* 226 Ga. 471 (175 SE2d 539). The evidence in the present case was obtained by purchase. Enumerated error 3 is without merit.

4. The *sole* contents of the magazine sold by appellant were photographic depictions of nudity (including unclothed human male and female genitalia in close proximity) and acts of homosexuality, sadism and masochim, and verbal descriptions (in coarse, vulgar language) of acts of masturbation, homosexuality, sodomy, bestiality, sexual intercourse (fornication), sadism and masochism. The jury was correctly charged as to the statutory definition of obscene material, as contained in *Code Ann.* § 26-2101 (b, c). Their finding, that the above-described material comes within such statutory definition, is authorized by the evidence, which supports their verdict of guilty. Enumerated error 4 is without merit.

5. The statute in question is not unconstitutional as applied on the grounds that there was evidence neither of what had and had not been held previously to be obscene nor that the material in question appealed predominantly to the prurient interest of the "average member of the community." A clergyman testified for the State as to community standards and generally as to the material's appeal to prurient interest and exceeding customary limits of candor, etc. Furthermore, the standard to be applied is not what may or may not have been held to be obscene in other jurisdictions, but what is acceptable in the local community. The jurors represented the average members of their own community and, as the triors of fact, were charged with the responsibility of making such determination, guided by the evidence presented and by their individual and collective wareness of the standards and norms of their community. Enumerated error 5 is without merit.

6. Accordingly, the trial court did not err in denying appellant's motions to dismiss, for a directed verdict, for a new trial, and in arrest of judgment, or in rendering judgment on the verdict of guilty.

Judgment affirmed. All the Justices concur.

APPENDIX B

26-2101. Distributing obscene materials.—(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

(Acts 1968, pp. 1249, 1302.)

Constitution of the United States

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representa-

tives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

Ratified July 28, 1868